No. 73-304

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In the Supreme Court of the United States

OCTOBER TERM, 1973

ROCCO CIANCIOTTI, JR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On January 21, 1972, indictments against petitioners were returned in the United States District Court for the District of Columbia. Petitioners, who were members of the Metropolitan Police Department, were charged with perjury, false statements, and conspiracy. Superseding indictments, charging substantially the same offenses, were returned against petitioners on September 8, 1972.[1] Trial was set for November 1, 1972. On October 26, 1972, however, the district court dismissed the conspiracy and false statement indictments with prejudice, on the grounds that there had been unnecessary delay in bringing petitioners to trial

[1] Lieutenant Harold F. Crook was named as a co-defendant in the first indictments; he was charged separately in the superseding indictments. The theory of conspiracy was correspondingly changed from a "wheel" conspiracy, with Crook at the hub, to a "chain" conspiracy among petitioners acting in concert together.

under Rule 48(b), Fed. R. Crim. P., and that the government's failure to prosecute a superior officer allegedly involved in the conspiracy constituted a prosecutorial abuse that could only be remedied by dismissal of the charges against petitioners (Pet. App. 1a-8a). The court of appeals, in a *per curiam* opinion, vacated and set aside the district court's dismissal order, holding that the district court had abused its discretion in dismissing the indictments where there had been no showing of prejudice to petitioners (Pet. App. 10a-12a). Petitioners here renew their claims of unnecessary pre-trial delay and prosecutorial abuse.

1. There is no claim here that the pre-trial delay violated petitioners' Sixth Amendment right to a speedy trial. The length of time between the original indictments and the scheduled trial date was less than ten months. The delay was occasioned by several factors, including the need to conceal an independent investigation in which one of petitioners' co-defendants was cooperating, the illness of an important government witness, and a change in the theory of conspiracy which made reindictment advisable. Thus the court of appeals held, and petitioners apparently agree (Pet. 14), that dismissal of the indictments could not be justified under *Barker* v. *Wingo*, 407 U.S. 514.

At most, these factors delayed trial from June 12, 1972, the original trial date, to November 1, 1972. Petitioners make no showing of specific prejudice resulting from such delay. Thus, even though Rule 48(b) may permit the district court in the exercise of its discretion, to dismiss an indictment in some instances where the delay is not of such magnitude as to jeopardize the constitutional right to a speedy trial, there was no basis here for the exercise of that discre-

tion.[2] The court of appeals determination to that effect warrants no further review.

2. Petitioners contend that the government's failure to prosecute their superior officer, Lieutenant Harold F. Crook, warrants dismissal of their own indictments. But, after his indictment, Crook cooperated with and assisted the prosecution in a wide-ranging investigation into corruption in the municipal police force. As a direct result, an additional twenty-two indictments have been returned involving several more police officers. In return for this assistance, Crook was in effect granted immunity from further prosecution. The grant of such immunity is, of course, an important tool in investigations against crime, and its use should not be hampered or discouraged by judicial extension of immunity to non-cooperating defendants such as petitioners. The government's decision not to prosecute Crook should have no bearing on petitioners' liability for trial, and the court of appeals properly so decided.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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[2] Indeed, Rule 48(b) permits dismissal of indictments only where there has been "unnecessary" delay on the part of the prosecution. Under the facts of this case, we submit that the delay was clearly justifiable, and the district court was thus without power to dismiss the indictments. Moreover, as the court of appeals noted (Pet. App. 12a), any dismissal should be without prejudice to reindictment unless the defense has been (as it was not here) harmed by the delay.

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